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**IN THE  
COURT OF APPEALS OF INDIANA**

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JIMMY E. ISOM, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A05-0509-CR-557
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE WHITE SUPERIOR COURT  
The Honorable Robert B. Mrzlack, Judge  
Cause No. 91D01-0303-FA-39

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**August 22, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Chief Judge**

Jimmy E. Isom, Jr., appeals his conviction for possession of a firearm by a serious

violent felon,<sup>1</sup> a Class B felony. He raises the following restated issues:

- I. Whether the trial court erred in denying his motion for mistrial based on prosecutorial misconduct.
- II. Whether the State presented sufficient evidence that he possessed the firearms.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Several police officers went to Isom's home to serve an arrest warrant on Isom. Isom was arrested as he ran from the house. Six other people in the residence at the time were also arrested. During a search pursuant to a search warrant, officers found a Winchester rifle hanging on the wall in the computer room or den and a Remington shotgun with "Jimmy" stamped on the side, a gun barrel, and some shotgun shells inside a closed closet in the master bedroom. Isom was charged with possession of a firearm by a serious violent felon, dealing in methamphetamine, and possession of marijuana.

The trial court granted Isom's motion to sever the firearms charge from the drug-related charges. Isom was tried by a jury on the firearms charge and convicted. His request for a mistrial was denied. He was sentenced to fifteen years to be served consecutive to a fifteen-year sentence for one count of dealing in methamphetamine to which he had pled guilty.

### **DISCUSSION AND DECISION**

A mistrial is an extreme remedy warranted only when no other curative measure will

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<sup>1</sup> See IC 35-47-4-5.

rectify the situation. *Kirby v. State*, 774 N.E.2d 523, 533-34 (Ind. Ct. App. 2002), *trans. denied*. The determination of whether to grant a mistrial is within the trial court's discretion, and we will reverse only for an abuse of that discretion. *Id.* An abuse of discretion has occurred if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* We accord great deference to the trial court's decision, as it is in the best position to gauge the circumstances and the probable impact on the jury. *Id.*

Isom contends that the trial court erred in denying his request for a mistrial because the prosecutor committed misconduct in his opening statement when he said that an officer would testify as to why the Drug Task Force went to Isom's residence and that the officer smelled the odor of anhydrous ammonia and saw items that led him to believe that methamphetamines were being manufactured there. Isom did not object. Later, the prosecutor sought to introduce testimony from his first witness that he worked for the Drug Task Force and to explain why he obtained a warrant to search the house for methamphetamine-related items. Isom objected, and the trial court reminded the prosecutor that the drug charges had been severed and that he should limit testimony to the gun-related items. The trial court stated: "I don't want the jury to hear any more about the extra information related to the drug charges through this witness, or any other witness." *Appellant's App.* at 99-100.

On redirect of this witness, the prosecutor repeatedly tried to elicit testimony as to why the others in the house were arrested. The trial court sustained Isom's objections and again reminded the prosecutor to avoid asking questions that were intended to bring the drug

issue before the jury. Despite this warning, the prosecutor elicited testimony from a second officer that he was a narcotics investigator trained to dismantle methamphetamine labs and that he saw a cloud of smoke or vapor coming from the garage when he arrived at the residence. Isom's counsel requested a bench conference and moved to strike the officer's comments about dismantling methamphetamine labs and also moved for a mistrial. The court denied both motions but reminded the prosecutor that the "State is getting close to . . . [p]rejudicing this jury and giving me no other choice but to declare a mistrial." *Appellant's App.* at 123-24.

A claim of misconduct is measured by the probable persuasive effect of any misconduct on the jury's decision and whether there were repeated instances of misconduct which would evidence a deliberate attempt to improperly prejudice the defendant. *Ritchie v. State*, 809 N.E.2d 258, 269 (Ind. 2004), *cert. denied*, 126 S. Ct. 42, 74 USLW 3203 (2005). The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the misconduct. *Roberts v. State*, 712 N.E.2d 23, 28-29 (Ind. Ct. App. 1999), *trans. denied*. Therefore, we need not first determine that the prosecutor committed misconduct, but rather we can determine the prejudicial weight of the prosecutor's comments and questions. To do so, we will look to the properly admitted evidence of the charged possession of firearms by a serious violent felon.

Isom admitted that he had a prior conviction for a violent felony. Thus, the State had only to offer sufficient evidence that he possessed any firearm. Illegal possession of a firearm may be proven by either actual or constructive possession. *Tate v. State*, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005), *trans. denied*. Because neither of the guns was found on

Isom's person, the State must prove constructive possession of the guns, i.e., that Isom had knowledge of the guns and intent and ability to maintain dominion and control over either gun. *Id.* Possession need not be exclusive. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004).

Here, the Winchester was found in plain view hanging over the closet door in Isom's den or computer room. The Remington was found in the master bedroom closet. The gun had "Jimmy" carved in the side. Both guns were found in the personal living spaces such as the master bedroom and den over which Isom had dominion and control. Because the evidence to support the conviction is overwhelming, the prosecutor's comments and questions, whether or not they were serious enough to constitute misconduct, did not create substantial prejudice to Isom. *See Myers v. State*, 718 N.E.2d 783, 790 (Ind. Ct. App. 1999), *trans. denied*.

While we do not condone the prosecutor's conduct, in light of the overwhelming evidence against Isom, we are confident that the prosecutor's statement did not have a probable persuasive effect on the jury.

Affirmed.

BAILEY, J., and CRONE, J., concur.